

MOTION FILED  
SEP 2 1978

IN THE  
SUPREME COURT  
OF THE UNITED STATES  
October Term, 1978

No.

~~77~~-1553

COUNTY OF LOS ANGELES; BOARD OF  
SUPERVISORS OF LOS ANGELES; and CIVIL  
SERVICE COMMISSION OF THE COUNTY  
OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHAL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

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MOTION OF CALIFORNIA ORGANIZATION OF POLICE AND SHERIFFS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF CALIFORNIA ORGANIZATION OF POLICE AND SHERIFFS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE AND BRIEF OF  
CALIFORNIA ORGANIZATION OF  
POLICE AND SHERIFFS

Pursuant to Rule 42 of the United  
States Supreme Court, the California Organiza-  
tion of Police and Sheriffs, Inc., a labor organ-  
ization consisting of the San Francisco Police

Officers Association, the Anaheim Police Associ-  
ation, the Burbank Police Officers Association,  
the Compton Police Officers Association, the  
Glendale Police Officers Association, the Ingle-  
wood Police Association, the Long Beach Police  
Officers Association, the Novato Police Officers  
Association, the Santa Ana Police Benevolent  
Association, the Signal Hill Police Association,  
the Hawthorne Police Association, the Hermosa  
Beach Police Association, the Montebello Police  
Association, the Napa Police Association, the  
Santa Monica Police Association, the Benicia  
Police Association, the Bell Gardens Police Offi-  
cers Association, the Half Moon Bay Police Offi-  
cers Association, the Huntington Park Police  
Officers Association, the Huntington Beach Po-  
lice Officers Association, the Redondo Beach  
Police Officers Association, the San Mateo Po-  
lice Officers Association, the Santa Clara Po-  
lice Officers Association, and the Yolo County  
Sheriffs Association. The membership of each

of these Associations consists of sworn police officers or sheriffs employed by local public agencies throughout the State of California. The issues involved in County of Los Angeles, et al. v. Van Davis, etc., et al, are of the greatest importance to police officers throughout the State. This case pertains to the standards of burdens of proof necessary to establish violations of Constitutional and statutory guarantees to equal employment. Each of the police and sheriff organizations within the California Organization of Police and Sheriffs is required by law to adhere to the statutory provisions guaranteeing equal employment and promotional opportunities within their respective local public agencies. In order to comply with Constitutional and statutory guarantees to equal employment, there must be a clearly delineated standard for burdens of proof in 1981, 1983 and Title VII litigation.

The primary interest of the California Organization of Police and Sheriffs is employer-

employee relations. The California Organization of Police and Sheriffs leads the vanguard in the State of California in this area as it pertains to sworn peace officers.

The amicus curiae brief raises Constitutional issues not explicitly argued by counsel for the County of Los Angeles who consents to this brief being submitted. In its brief, County of Los Angeles argues that proof of purposeful racial discriminatory intent is required to establish a cause of action for employment discrimination under 42 U.S.C. § 1981. The amicus brief directs itself to the Constitutional issues of whether or not a racial quota can be imposed without a specific finding of intentional discrimination pursuant to 42 U.S.C. § 2000e-5 (g) and whether a court can impose a racial quota without a specific demonstration that no other remedy is available to rectify the past discriminatory practices.

The arguments made in the amicus curiae brief are central to the disposition of this matter

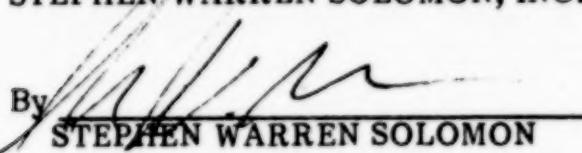
and will not otherwise be before this Court.

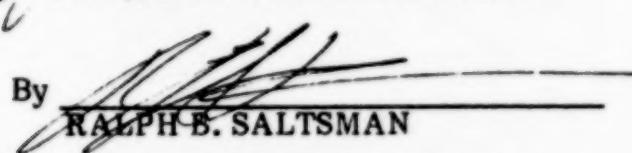
It is the contention of this amicus curiae brief that the remedy of a racial quota imposed for a violation of Title VII without a finding of intent is impermissible under 42 U.S.C. § 2000e-5 (g). Without a demonstration of purposeful intent, the imposition of a racial quota exceeds the equitable jurisdiction of the District Court and is an abuse of discretion.

WHEREFORE, the California Organization of Police and Sheriffs respectfully requests this Court to permit the filing of the brief amicus curiae which is submitted herewith.

Respectfully submitted,

STEPHEN WARREN SOLOMON, INC.

By   
STEPHEN WARREN SOLOMON

By   
RALPH E. SALTSMAN

Attorneys for California Organization of Police and Sheriffs, Inc.

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BRIEF AMICUS CURIAE FOR CALIFORNIA ORGANIZATION OF POLICE AND SHERIFFS, INC.

California Organization of Police and Sheriffs hereby submit the brief for consideration by this Court in review of the judgment of the United States Court of Appeal for the Ninth Circuit

entered on this proceeding on December 14, 1977.

#### OPINIONS BELOW

The opinion of rehearing of the United States Court of Appeals for the Ninth Circuit is reported in Van Davis, et al. v. County of Los Angeles et al., 566 F.2d 1334 (9th Cir. 1977). This case is printed as Appendix A, page 1 in the petition for writ of certiorari submitted by petitioners in this matter. The unreported original opinion of the Circuit Court is printed as Appendix B thereto. The judgment and findings of the District Court are printed as Appendices C, and D, respectively to the petition for writ of certiorari.

#### JURISDICTION

The opinion and judgment were entered on December 14, 1977. A petition for rehearing was filed by respondents, Van Davis, et al. (plaintiffs-appellants below), which was denied on January 30, 1978.

Jurisdiction of the District Court was based on 28 U.S.C. § 1343.

This Court's jurisdiction is invoked under

28 U.S.C. § 1254(1) and Rule 19(1)(b).

#### QUESTION PRESENTED

Is the imposed remedy consisting of racial quotas for a violation of Title VII permissible pursuant to 42 U.S.C. § 2000e-5(g) where there is no finding of intentional discrimination?

Is the imposition of a racial quota where there is no demonstration of purposeful intention an appropriate remedy available to the District Court, or does the District Court exceed its equitable jurisdiction in fashioning such a remedy?

#### CONSTITUTIONAL ISSUES AND STATUTES INVOLVED

1. The Fifth and Fourteenth Amendments to the United States Constitution; in particular, the due process and equal protection clauses thereof;

2. The following provisions of the United States Code:

42 U.S.C. § 2000e-5(g) (injunctions- re-

instatement-backpay):

"If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . ."

#### ARGUMENT

##### I.

A REMEDY OF RACIAL QUOTAS IMPOSED FOR A VIOLATION OF TITLE VII WITHOUT A FINDING OF INTENT IS IMPERMISSABLE UNDER 42 U.S.C. § 2000e-5(g)

42 U.S.C. § 2000e-5(g) provides in pertinent part:

"If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court

may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . ." (emphasis added.)

The District Court of Appeal in Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977) noted that the District Court "found that the Los Angeles County Fire Department employed blacks and Mexican-Americans grossly out of proportion to their number in the population of Los Angeles County." There was never a judicial determination that there was a showing that the defendants "administered the 1972 examination with any intent or purpose to discriminate against minority applicants." (page 1338.)

Although this Court, and the Circuit Courts of Appeal, have consistently recognized

the equitable relief available to District Courts in fashioning remedies for violations of Title VII, this Court in Franks v. Bowman Transportation Co., 4024 U.S. 747, 47 L.Ed.2d 444, 96 S.Ct. 1251 (1976) significantly differentiated between the definitional provisions of Title VII and the remedial provisions of Title VII:

"On its face, § 703(h) appears to be only a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. § 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g), 42 U.S.C. § 2000e-5(g) [42 U.S.C.S. § 2000e-5(g)], in circumstances where an illegal discriminatory

act or practice is found."

Other cases have duly recognized the obligation of the trial court to determine the existence of intentional unlawful employment practices pursuant to § 2000e-5(g).

The Court in Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. 1974) found that the District Court in that matter did overcome the hurdle of finding intentional unlawful employment practices prior to employing its discretionary authority a scheme of affirmative action required to remedy those unlawful employment practices. The Court in Evans, supra, held:

"Having found intentional unlawful employment practices, 42 U.S.C. § 2000e-5(g) vests in the District Court discretionary authority to order, as part of the affirmative action necessary to obviate such unlawful employment practices, that the party

responsible pay to the aggrieved person backpay damages. . . ."

The District Courts, and the Courts of Appeal, have, from time to time, ignored the requirement of a finding of intent before fashioning an equitable remedy in Title VII cases. (See United States v. City of Chicago, 49 F.2d 415 (7th Cir. 1977).

The error committed by the Court in United States v. Chicago, supra, and those Circuit Courts of Appeal cited therein, has been made repeatedly. This Court, has rendered decisions considering the propriety of remedial relief proposed by District Courts in Title VII cases, without squarely deciding the issue presented herein. The rule which has evolved concerning the burden of proof in Title VII cases, ignores the clear and plain legislative statement by Congress in its adoption of § 2000e-5(g).

This Court in Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 240 (1976) cir-

cumvented the issue of the propriety of the burden of proof set forth in the remedial section within Title VII. In Washington, supra, at page 240, it was simply stated:

"As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the Constitutional rule. We have never held that the Constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and would decline to do so today."

No court has recognized the literal read-

ing of § 2000e-5(g). This case, however, requires such a recognition. The question which must be answered is: may a District Court fashion equitable relief without a demonstration of intent pursuant to Title VII? The response must be in the negative.

The Court of Appeal in Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971) held that:

"Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

The Court in Robinson, supra, relied on this Court's decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) wherein it was stated:

"Under the Act, practices, procedures, or tests neutral on

their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

This Court continued:

"Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." (91 S.Ct. at 853.)

In reading Griggs, supra, however, it must be understood that the Court therein did not condone the use of racial quotas, and in fact issued a policy statement limiting the use of quotas:

"Congress did not intend by Title VII however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because

he was formerly the subject of discrimination, or because he is a member of a minority group.

Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

It is not the contention of *amicus curiae* herein to circumvent the holding of Griggs, supra, as to discriminatory intent, but to seek recognition of the concept that absent a clear demonstration of actual intent, the imposition of a remedy as disruptive as a racial quota, is not within the province of the trial court.

In Local 189, United Paper Mak and Paper

Work v. United States, 416 F.2d 980 (5th Cir. 1969) the Court discussed the necessity of a finding that an employer has intentionally engaged in an unlawful employment practice. The Court stated:

"§ 706(g) limits injunctive (as opposed to declaratory) relief

to cases in which the employer or union has 'intentionally engaged in' an unlawful employment practice. Again, the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental."

The Court in Local 189, United Paper Mak and Paper Work, supra, continued:

"Here, as in Dobbins, the conduct engaged in had racially-determined effects. The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them."

In Paper Mak, supra, intention was found by implication. In the case at bar, intention was ignored altogether.

It is the position of amicus curiae that where a racial quota is to be imposed, actual demonstrable intent must be established by the evidence. Intent by implication is insufficient for such relief to be imposed; intent by inference is insufficient for such relief to be imposed; and circumvention of the statutory requirement of intention altogether is unlawful.

## II.

**WITHOUT A SUBSTANTIAL DEMONSTRATION  
THAT A LESS ONEROUS REMEDY WOULD  
ALLEViate THE DAMAGE TO PLAINTIFFS  
THE IMPOSITION OF RACIAL QUOTAS IS  
AN ABUSE OF DISCRETION AS A MATTER  
OF LAW**

The imposition of a racial hiring quota is the most devastating device that can be imposed by the Courts in the United States of America, both to the person passed over for public employment and the citizen requiring effective emergency service. It on its face favors one person over another because of the color of their skin or race as opposed to merit and ability. People in burning buildings,

heart attack victims lying on the street, and small children stuck in treetops care not what the race or color of their fire department rescuers are but only hope and pray for effective and efficient public assistance.

Racial quotas are on their face judicial acts of court approved invidious discrimination and create a judicial suspect classification requiring a compelling justification allowing their use. Regents of the University of California v. Bakke, \_\_\_ U.S. \_\_\_ 98 S.Ct. 2733, 2748 (1978).

This Court has given approval to the Court of Appeal cases wherein District Courts have imposed racial quotas in employment discrimination cases. Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (CA.2 1973), Carter v. Gallagher, 452 F.2d 315 (CA.8) modified on rehearing en banc, 452 F.2d 327 (CA.8 1972), but has not indicated upon what legal standards trial courts should exercise their discretion prior to the imposition of racial quotas or some other remedy. Regents

of the University of California v. Bakke, \_\_\_ U.S.

\_\_\_ 98 S.Ct. 2733, 2754 (1978).

Racial hiring quotas should only be authorized when there is a demonstration to the Court that other less onerous remedies are not available and workable.

In the case at bar there was no evidence brought that other remedies would not be sufficient to vindicate any alleged suffering caused the plaintiffs.

Courts exercising legal discretion in imposing remedies for non-intentional acts of test discrimination should be required to evaluate their proposed remedy against a clear demonstrable standard. This standard should require an analysis of the following competing interest:

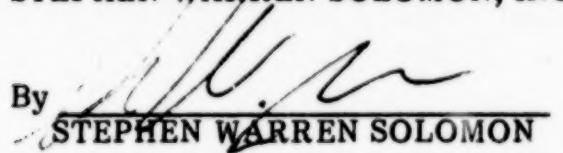
- a) Was the employer guilty of intentional acts of discrimination?
- b) Would monetary damages suffice?
- c) Would an order requiring racially neutral retesting open employment opportunities?

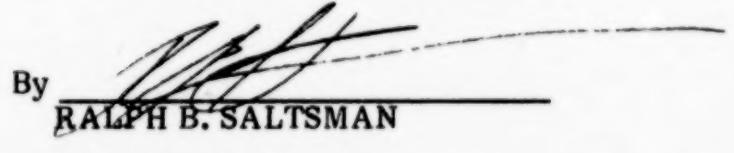
d) Would remedial educational and training programs upgrade the applicant's skills to pass entry level tests?

The Court below failed to make the distinction between the case where intentional acts of discrimination have been demonstrated and where there has been no such showing in fashioning a remedy unsurpassed in its devastating effects. Additionally, no demonstrable standard has been established to aid the Courts in fashioning equitable relief in Title VII cases. For these reasons and for the above reasons set forth this matter should be reversed and remanded for further findings consistent with a standard to be established by the United States Supreme Court in aiding the trial courts in effectuating appropriate remedies in Title VII cases where no intentional discrimination is found.

WHEREFORE, the California Organization of Police and Sheriffs respectfully request that the matter be reversed and remanded.

Respectfully submitted,  
STEPHEN WARREN SOLOMON, INC.

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Dated: September 1, 1978